

Before the
Federal Communications Commission
Washington, D.C. 20554

In re)	
)	
MARITIME COMMUNICATIONS/LAND)	EB Docket No. 11-71
MOBILE, LLC)	File No. EB-09-IH-1751
)	FRN: 0013587779
Participant in Auction No. 61 and Licensee of)	
Various Authorizations in the Wireless Radio)	
Services)	
)	
Applicant for Modification of Various)	Application File Nos. 0004030479,
Authorizations in the Wireless Radio Services)	0004193028, 0004193328, 0004354053,
)	0004309872, 0004310060, 0004314903,
Applicant with ENCANA OIL AND GAS (USA),)	0004315013, 0004430505, 0004417199,
INC.; DUQUESNE LIGHT COMPANY; DCP)	0004419431, 0004422320, 0004422329,
MIDSTREAM, LP; JACKSON COUNTY)	0004507921, and 0004604962
RURAL MEMBERSHIP ELECTRIC)	
COOPERATIVE; PUGET SOUND ENERGY,)	
INC.; ENBRIDGE ENERGY COMPANY,)	
INC.; INTERSTATE POWER AND LIGHT)	
COMPANY; WISCONSIN POWER AND)	
LIGHT COMPANY; DIXIE ELECTRIC)	
MEMBERSHIP CORPORATION, INC.)	
)	

To: Marlene H. Dortch, Secretary
Attention: Chief Administrative Law Judge Richard L. Sippel

**ENFORCEMENT BUREAU'S MOTION TO STRIKE
ENL-VSL'S PROPOSED FINDINGS OF FACT**

1. In *Order*, FCC 15M-9, the Presiding Judge directed the parties to submit Proposed Findings of Fact on Issue (G) by April 8, 2015.¹ In response, Environmental LLC and Verde Systems, LLC (collectively, ENL-VSL) submitted a nearly 50-page document which not only failed to comply with the Commission requirement to set forth proposed findings in serially

¹ See *Order*, FCC 15M-9 (ALJ, rel. Mar. 9, 2015).

numbered paragraphs with appropriate citations, but also relied on documents that were not admitted into evidence, presented the absence of testimony as if it were evidence, revealed confidential information that should have been filed under seal, and suggested that the Enforcement Bureau (Bureau) had somehow impeded the hearing through its sustained objections.² In addition, despite the Presiding Judge's instructions to include only proposed findings of fact,³ ENL-VSL improperly included argument and legal conclusions in its submission. For these reasons, and as discussed more fully below, the Chief, Enforcement Bureau, by his attorneys, respectfully requests that the Presiding Judge take the extraordinary step of striking ENL-VSL's Proposed Findings in their entirety from the record.

2. First, pursuant to Section 1.264 of the Commission's rules, "[p]roposed findings of fact shall be set forth in serially numbered paragraphs and shall set out in detail and with particularity all basic evidentiary facts developed in the record (with appropriate citations to the transcript of record or exhibit relied on for each evidentiary fact."⁴ Not only does ENL-VSL fail to set out their proposed findings in serially numbered paragraphs, but in large part, ENL-VSL's submission fails to include any citation (*see, e.g.*, ENL-VSL Proposed Findings at 2-3, 6, 24-31, 32-33, 48-49). Thus, the parties and the Presiding Judge are left to guess the source of ENL-VSL's assertions. On this procedural basis alone, the Presiding Judge should strike ENL-VSL's Proposed Findings.

3. Second, to the extent ENL-VSL includes cites as support for its assertions, it relies heavily on documents that were not admitted as evidence into the record. For example, ENL-VSL's Proposed Findings repeatedly refer the parties and the Presiding Judge to "records

² See ENL-VSL Proposed Findings of Fact on Issue G, filed Apr. 8, 2015 (ENL-VSL's Proposed Findings).

³ See Transcript of Hearing Proceedings (Hearing Tr.) at 1702:25-1703:16.

⁴ 47 C.F.R. § 1.264.

in ULS” (the Commission’s official licensing database)⁵ on the presumption that simply because “ULS is part of the official records of the Commission...[it] must be taken into account in rendering a decision on Issue G....”⁶ The only documents from ULS upon which ENL-VSL can properly rely in support of its Proposed Findings, however, are those print-outs from the ULS database which the Presiding Judge admitted into evidence (*see, e.g.*, EVH Exhs. 89, 139, 150, 154, 209, 218). Any additional citations to information and/or documents ENL-VSL purports can be found in the ULS system should be stricken from ENL-VSL’s Proposed Findings. ENL-VSL also relies on a “Bench Brief” filed in ECFS during the hearing⁷ and the documents that were attached thereto.⁸ Specifically, ENL-VSL’s Proposed Findings state unequivocally that documents attached to the Bench Brief “are part of the public record in this case....”⁹ However, neither Mr. Havens’ Bench Brief nor any of the exhibits to that Brief were admitted as evidence during this proceeding. Thus, any references to them in ENL-VSL’s Proposed Findings are improper and should be stricken.

4. Third, ENL-VSL also repeatedly relies on self-serving statements about what the Bureau’s witnesses *did not testify* about as if this constitutes evidentiary support for ENL-VSL’s Proposed Findings.¹⁰ By its very nature, however, the absence of testimony cannot be

⁵ ENL-VSL’s Proposed Findings at *i*; *see also* 6, 11, 19, 27-30.

⁶ *Id.* at 27.

⁷ ENL-VSL’s Proposed Findings fails to include a specific record citation to the “Bench Brief.” It appears from the description of the Bench Brief that ENL-VSL is referring to Mr. Havens’ December 10, 2014 filing requesting access to confidential documents. *See* [Mr. Havens’] Memo on Documents Alleged Confidential Under the Protective Order But Lawfully in the Public Domain, EB Docket 11-71, filed Dec. 10, 2014.

⁸ *See, e.g.*, ENL-VSL’s Proposed Findings at 25-31.

⁹ *Id.* at 25.

¹⁰ *See, e.g., id.* at 5 (“[Mrs. DePriest] *does not claim* that Pinnacle operates any of the station locations on WRV374...*does not claim* that Pinnacle operates stations that qualify as ‘fill-in’ stations [and] *offers no direct testimony* that Pinnacle is operating any ‘fill-in’ in’ stations.”) (emphasis added); *Id.* at 7 (“[Mrs. DePriest] *does not testify* that Puget or Evergreen operate any of the station locations on KAE889 [or] that either of them operate or operated ‘fill-in’ stations [and] *does not acknowledge* that Puget is the geographic area licensee.”) (emphasis added); *Id.* at 11 (“Reardon *fails to disclose* that the lease does not provide for Pinnacle to operate any of the stations on

substantiated by the record and thus cannot form the requisite evidentiary foundation for a proposed finding of fact. Even more egregious is that, in many instances, in making these statements about what a witness did not testify to, ENL-VSL cites to the witnesses' written direct testimony as if to suggest that there is documentary support for the statement, when in fact none exists.¹¹ In the end, this appears to be nothing more than a thinly-veiled attempt by ENL-VSL to shoehorn information into the record that it was unable to develop during the hearing. Such an abuse of process should not be tolerated.

5. Fourth, in direct contravention to the terms of the Protective Order, to which counsel for ENL-VSL agreed, ENL-VSL revealed "confidential" information in its publicly-filed Proposed Findings without redacting it.¹² In particular, ENL-VSL's Proposed Findings discusses Choctaw's future plans for the Maritime spectrum if the Commission consents to the assignment of Maritime's AMTS licenses to Choctaw.¹³ Although ENL-VSL fails to provide any citation for these statements in ENL-VSL's Proposed Findings, both the written direct testimony and the live testimony concerning this subject matter was designated "confidential" and was redacted from the public record.¹⁴ Pursuant to Paragraph 11 of the Protective Order, ENL-VSL was therefore obligated to take the appropriate steps to maintain the confidentiality of this information in its Proposed Findings.¹⁵ ENL-VSL's failure to do so raises questions about whether it should be entrusted with confidential information in the future.

WRV374..." (emphasis added); *Id.* at 16 ("[Mr. Smith] *does not testify* that locations 35, Rehoboth, MA and 40, Hamden, CT, were operating, even as long ago as 2005") (emphasis added); *Id.* at 18 ("Allen *omits* to explain that technological advancements in the use of cellular type systems are the reason that the Commission transitioned the AMTS band to geographic licensing..." (emphasis added).

¹¹ See, e.g., *id.* at 5, 11, 12, 15, 18, 20.

¹² See *Protective Order*, FCC 11M-21, at ¶ 11.

¹³ See ENL-VSL's Proposed Findings at 24-25, 48.

¹⁴ See, e.g., EB Exh. 1B at ¶¶ 3-9; Hearing Tr. at 1461:13-20; 1462:20-1463:25; 1468:14-1469:6; 1620:7-13; 1620:15-1621:21.

¹⁵ See *Protective Order*, FCC 11M-21, at ¶ 11.

6. Fifth, ENL-VSL's Proposed Findings improperly include assertions that the Bureau somehow "prevented" the witnesses from providing specific testimony at the hearing.¹⁶ Such assertions are patently false. Neither the Bureau nor any other party to the hearing "prevented" any evidence from being admitted. The admissibility of evidence lies solely within the discretion of the Presiding Judge. Moreover, to the extent that the Presiding Judge sustained the Bureau's (and others') objections to ENL-VSL's questions, ENL-VSL's use of its Proposed Findings to introduce information that it was precluded from developing during the hearing is an inappropriate end-run of the Presiding Judge's evidentiary rulings and should not be tolerated.

7. And lastly, despite the Presiding Judge's clear instructions that the parties include only proposed findings of fact in their submissions,¹⁷ ENL-VSL's Proposed Findings include legal arguments and conclusions. For example, ENL-VSL repeatedly argues what the purported "preponderance of the evidence" shows¹⁸ or what the testimony makes "obvious,"¹⁹ "confirms"²⁰ or "underscores."²¹ Indeed, ENL-VSL contends that "EB failed to prove the facts that it promised to prove in its opening statement."²² In addition, ENL-VSL's Proposed Findings improperly characterize testimony as "inconsistent" with that of another witness or with other information in the record.²³ ENL-VSL's Proposed Findings also include argument concerning questions that have already been decided (such as whether the "continuity of service"

¹⁶ See, e.g., ENL-VSL's Proposed Findings at 8, 9, 10, 18, 19, 21.

¹⁷ See Hearing Tr. at 1702:25-1703:16.

¹⁸ See, e.g., ENL-VSL's Proposed Findings at 33 (contending "it must be concluded by a preponderance of the evidence that Maritime has permanently discontinued operation of all sixteen stations under Issue G") and 37 ("The preponderance of the evidence is that Maritime is not operating or maintaining any of the WRV374 licensed locations and has not been since August 1, 2011, at the latest."). See also *id.* at 21, 24, 26, 17, 29-30, 32, 37, 40, 42, 44, 45 (identifying what certain information "shows").

¹⁹ *Id.* at 27.

²⁰ *Id.* at 40.

²¹ *Id.* at 7; see also *id.* at 23, 45.

²² *Id.* at 3.

²³ See, e.g., *id.* at 5, 6, 8, 14, 16, 20, 46.

requirements of Section 80.475(a) of the Commission's rules were met in demonstrating timely construction),²⁴ and other issues that were not even designated for hearing (such as whether Maritime met CMRS interconnect requirements or obtained service discontinuance or impairment authority under Section § 80.471 of the Commission's rules).²⁵ To the extent ENL-VSL has thus used its Proposed Findings submission as yet another opportunity to make its legal arguments, it should be stricken from the record.

8. For the foregoing reasons, the Bureau respectfully requests that the Presiding Judge strike ENL-VSL's Proposed Findings. In the alternative, the Bureau requests that the Presiding Judge establish a schedule pursuant to which the parties may file reply findings of fact.

²⁴ *See id.* at 31.

²⁵ *Id.*

Respectfully submitted,

Travis LeBlanc
Chief, Enforcement Bureau

A handwritten signature in black ink, appearing to read "Pamela S. Kane", written over a horizontal line.

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April 15, 2015

CERTIFICATE OF SERVICE

Tamika Parker, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 15th day of April, 2015, sent by first class United States mail copies of the foregoing "ENFORCEMENT BUREAU'S MOTION TO STRIKE ENL-VSL'S PROPOSED FINDINGS OF FACT" to:

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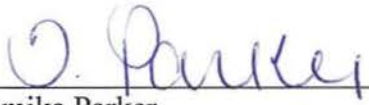
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